

Once More unto the Breach? An Independent Scotland, Europe, and the Law

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When Scotland voted to remain part of the United Kingdom on 18 September 2014, many people thought that the question of Scottish independence had been settled for at least a generation. The EU referendum of 23 June 2016, where 62% of Scottish voters opted to remain in the EU, but 51% of the overall UK electorate voted to leave, changed this perception. In the words of the Scottish First Minister Nicola Sturgeon, another independence referendum was 'firmly back on the table'.

Indeed, on Monday she [announced](#) that she would ask the Scottish Parliament to allow her to agree with the UK Government on another independence referendum. The Scottish people should be given a right to decide – once the terms of Brexit are known – whether to stick with the UK and leave the EU or pursue the route of independence and stay within 'Europe'.

This blog post will briefly outline some of the legal obstacles on the way, both internal and external.

The internal dimension

Internally, mirroring the procedure [resulting in the 2014](#) vote, the Scottish Government will seek an Order in Council under section 30 of the Scotland Act 1998. The section 30 order would grant the Scottish Parliament the powers under the UK devolution settlement to call another independence referendum. According to schedule 7 of the Scotland Act, such an order must be approved by a resolution of both the House of Commons and the House of Lords as well as by the Scottish Parliament.

This means that the Scottish Government would need the backing of the UK Government and Parliament for such a move. Whether this backing is forthcoming is currently unclear. What is politically important, however, is that Sturgeon has kicked the ball firmly into Westminster's court. If Westminster refuses to grant another referendum, this may cause resentment in Scotland (the Scottish nationalists will certainly interpret a refusal as another piece of evidence that Scotland's wishes are being ignored); if Westminster concedes, there is a real risk of the UK's Union breaking up given that a recent [poll](#) produced a 50-50 tie between supporters and opponents of independence.

Once a section 30 order has been adopted, the Scottish Parliament would need to legislate on the exact ramifications of a referendum. Nicola Sturgeon suggested that the date should be towards the end of the Brexit negotiation process, which means some time between the autumn of 2018 and the spring of 2019. Moreover, that legislation would also need to determine the franchise. In [2014](#) the electorate was identical with that of the Scottish Parliament elections plus young voters under 16. This includes EU citizens, who might become an important factor in this referendum.

The external dimension

Sturgeon's announcement to ask for another independence vote only makes sense before the backdrop of Brexit. The pro-independence camp will want to present voters with a choice between staying part of 'Brexit Britain' and an independent Scotland remaining in 'Europe'.

The UK Prime Minister Theresa May is likely to initiate the process of leaving the EU this week, which would result in the UK leaving the EU in March 2019 after the two-year period for negotiations foreseen by Article 50 TEU has

expired. If the negotiations go well, Brexit will result in a withdrawal agreement. According to the Government's plans, the UK will leave the single market and thus abandon free movement of people. Its aim will be to conclude a free trade agreement with the UK, probably negotiated during a transitional period of three to five years. If the negotiations fail, the UK will leave the EU in March 2019 without a deal. Trade will revert to WTO rules.

As Kirsty Hughes and I [argued in another blog post](#), it would take Scotland some time after an independence vote to extricate itself from the UK. This means that if an independence referendum were held in autumn 2018 or in early 2019, Scotland would leave the EU together with the UK even if such a referendum yielded a 'yes' result.

Scotland would thus have to apply for EU membership from outside on the basis of Article 49 TEU. It would need to fulfil the usual accession requirements, in particular adoption of the EU acquis and participation in the Economic and Monetary Union. In theory, Scotland would also need to commit to becoming part of the Schengen area, but it might be successful in negotiating an opt-out from this given the long-standing Common Travel Area between the UK and Ireland, which could in the future include an independent Scotland. Accession could be negotiated relatively quickly given that Scotland currently complies with much of the EU acquis. Nonetheless, a transitional arrangement – such as temporary membership of the European Free Trade Area (EFTA) and the European Economic Area (EEA) – would be necessary to ensure that Scotland stays within the single market.

Interestingly, Nicola Sturgeon's speech does not commit an independent Scotland to EU membership. She might therefore decide to campaign for an independent Scotland in the single market as a member of EFTA/EEA rather than in the EU. Aiming for EFTA/EEA membership would have the advantage of pre-empting some difficult arguments against independence: it would neither commit Scotland to adopt the Euro, nor to take part in the EU's common fisheries policy – an emotive issue in Scotland.

Moreover, it would potentially make trade between Scotland and rest of the UK (rUK) easier to manage. The volume of that trade is [reported](#) to be four times greater than between Scotland and the EU. In contrast to EU membership, EFTA/EEA membership does not prevent member states from having free trade arrangements with third countries (i.e. the rUK). If the rUK's relationship with the EU is either on WTO terms (in case of the UK crashing out of the EU without a deal) or based on a relatively basic free trade deal, Scotland would be able to come to a better arrangement with rUK. Whether Scotland could remain in a customs union with rUK – as proposed in the Scottish Government's paper 'Scotland's Place in Europe' released in December – would depend on whether current EFTA/EEA countries would insist on Scotland committing to sign up to EFTA's 27 free trade deals with third countries. This is a requirement found in Article 56 (3) of the EFTA Convention.

In any event the border between Scotland and rUK would become a trade border, even if only for the purpose of checking the correctness of declarations of origin (detailed comments can be found [here](#)). However, if Scotland and rUK continued to be part of the Common Travel Area immigration checks at the border could be avoided. Indeed, a future Scottish-rUK relationship could envisage free movement of people between the two.

Conclusion

Nicola Sturgeon's call for another Scottish independence referendum has added even more complexity to the Brexit mix. It is difficult to gauge how an intense Scottish independence campaign fought in parallel to the UK's Brexit negotiations would affect the UK's negotiating position. Would the UK aim for a softer Brexit in order to make staying part of the UK more attractive to wavering Scottish voters? Or would it aim for an even harder break with the EU than currently envisaged and try to create enough anti-EU resentment in Scotland to sway voters to stay with the UK? Or will Westminster simply try to sit it out and promise another referendum well after Brexit is done and dusted? These are probably some of the questions pondered in Whitehall

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